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Nos. 91-155 & 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,
Petitioners,

vs.

WALTER LEE, Superintendent of Port Authority Police,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF AMICI CURIAE OF THE AMERICAN TRACT SOCIETY, CHRISTIAN ADVOCATES SERVING EVANGELISM, FREE SPEECH ADVOCATES AND CONCERNED WOMEN FOR AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Whether the distribution of free religious literature may be prohibited from public concourses of Port Authority Airports?

2. Whether the distribution of free religious literature is a form of expression which is compatible with the environs of the public concourses of Port Authority Airports?

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Brief Amici Curiae Of The American Tract Society, Christian Advocates Serving Evangelism, Free Speech Advocates and Concerned Women For America In Support Of Petitioners

INTEREST OF THE AMICI IN THIS CASE*

Amici are organizations involved actively either in the production and distribution of free religious literature or in the defense of the right to distribute free religious literature in public places.

* Counsel of record for the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.

Amici share a common view that hand-to-hand distribution of free religious literature is an efficacious means of communicating with members of the public about such matters. Amici oppose the contention of Respondent that prohibiting the free distribution of religious literature from the public concourses of Port Authority Airports is a reasonable means of promoting the safe and convenient use of the Port Authority Airports.

The American Tract Society ("the Society") was founded in May, 1825, "to provide improved efficiency and greater economy in proclaiming the Gospel through the printed page in tract form."[1] Through its efforts in creating, printing and circulating religious materials, principally religious tracts, the Society has sought:

> to diffuse a knowledge of our Lord Jesus Christ as the Redeemer of sinners and to promote the interests of vital godliness and sound morality, by the circulation of Religious Tracts, calculated to receive the approbation of all Evangelical Christians.

ARTICLE I, *Constitution and By-Laws* at 1 (American Tract Society 1825). In its 166-year pursuit of this goal, the society has circulated over one billion leaflets.[2]

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[1] Dissertation by Stephen E. Slocum, Jr., *The American Tract Society: 1825-1975, An Evangelical Effort To Influence the Religious And Moral Life Of The United States* at 234 (New York University School of Education 1975) (hereafter cited as "Slocum").

[2] *Slocum, supra* n.1, at 238.

Christian Advocates Serving Evangelism ("CASE") and Free Speech Advocates are dedicated to the ideal that religious freedom and freedom of speech are inalienable rights given by God. CASE and FSA were formed to educate, and where necessary, to litigate on issues affecting the right to bear public witness to the Gospel. The commitment of CASE and FSA to the constitutional rights necessary for effective public evangelism has resulted in application of this Court's Public Forum Doctrine in a variety of public, nontraditional settings: beaches, state-owned resorts, college campuses, public secondary schools, national monuments, publicly owned coliseums, public bus terminals, and metropolitan rapid transit terminals.

Concerned Women for America ("CWA") is a national, nonprofit organization representing approximately 700,000 people. The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities.

The amici joined in this brief urge the Court to uphold the right to distribute free religious literature in such public places as the Port Authority Airport Terminals.

SUMMARY OF ARGUMENT

Analysis of the right to distribute free religious literature in the Port Authority's Airport Terminals proceeds in three steps, *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 797 (1985), identifying the nature of the speech and the nature of forum, and then evaluating the challenged

regulation or practice in light of the kind of speech and the kind of- forum.

In the case of the distribution of free religious literature, the unquestioned rule is that distributing free religious literature is a protected form of expression. With remarkable consistency,this Court has noted the constitutional value of religious leafletting in a line of cases from *Lovell v. City of Griffin*, 303 U.S. 446 (1938) to *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

The courts below disagreed on the nature of the forum at issue here. The district court concluded that the Port Authority's Airport Terminals were traditional public forums. *International Society for Krishna Consciousness v. Lee*, 721 F. Supp. 572 (S.D.N.Y. 1989). The second circuit, initially inclined to agree with the district court, ultimately concluded that the Airport Terminals were nonpublic forums from which the free distribution of religious literature could not reasonably be banned. *International Society for Krishna Consciousness v. Lee*, 925 F.2d 576 (2d Cir. 1991). The second circuit's conclusions, both as to the nonpublic forum status of the Airport Terminals and as to the unreasonability of a complete prohibition on leafletting therein, are attributed by that court to this Court's decision in *United States v. Kokinda*, 497 U.S. ___ , 111 L.Ed.2d 571 (1990).

While these amici do not read *Kokinda* as announcing the startlingly new public forum analysis that the second circuit below attribute to it, it is clear that whether the district court was correct, or the second circuit, distribution of free religious literature is an inherently less disruptive form of speech than many others. Thus, even in a nonpublic forum, a complete

prohibition of leafletting activities would be unreasonable.

ARGUMENT

The Port Authority of New York and New Jersey has promulgated a regulation, Rules and Regulations of the Port Authority of New York and New Jersey, Chapter III, Part B, which provides:

> B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:
>
> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> (a) The sale or distribution of any merchandise, including but not limited to, jewelry, food stuffs, candles, flowers, badges and clothing.
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds.

Petitioners, the International Society for Krishna Consciousness and Brian Rumbaugh brought the action below to challenge the constitutionality of Rules and Regulations of the Port Authority of New York and New Jersey, Chapter III, Part B. *International Society for Krishna Consciousness v. Lee*, 925 F.2d 576, 577 (2d Cir. 1991). Under Rules and Regulations

of the Port Authority of New York and New Jersey, Chapter III, Part B, a principal religious duty of the Petitioners known as *Sankirtan* cannot be conducted in the public areas of the Port Authority's Airport Terminals, even though the public is freely admitted to these areas. *Sankirtan* includes aspects both of charitable solicitation and distribution of religious literature. 925 F.2d at 577-78.

Both at trial and on appeal, Petitioners succeeded in their challenge to the Port Authority's prohibition of leafletting. The district court struck the leafletting ban after concluding that the Port Authority's Airport Terminals were traditional public forums. *International Society for Krishna Consciousness v. Lee*, 721 F. Supp. 572 (S.D.N.Y. 1989). The second circuit also reached the conclusion that leafletting could not be prohibited in the Airport Terminals, although it did so on the basis that the complete prohibition of leafletting in the nonpublic forum terminals was, *inter alia*, unreasonable. 925 F.2d at 582.

Even in the wake of this Court's decision in *United States v. Kokinda*, 497 U.S. ___, 111 L.Ed.2d 571 (1990), there remains a well-established framework for analyzing conflicts between governmental regulation and otherwise protected expression. Analysis of the right to distribute free religious literature in the Port Authority's Airport Terminals proceeds in three steps. *See Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 797 (1985). First, this Court must determine whether the distribution of free religious literature is speech protected by the First Amendment. *Id.* Next, this Court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the

forum is public or nonpublic." *Id.* Finally, this Court must determine whether the Port Authority's asserted justifications for a flat ban on free distribution of written materials satisfy the pertinent constitutional standards. *Id.*

Application of the Public Forum Doctrine framework here leads ineluctably to the same result, with respect to the right to distribute free religious literature, as reached by the United States Court of Appeals for the Second Circuit below.

I. DISTRIBUTION OF FREE RELIGIOUS LITERATURE IS WELL-RECOGNIZED AS A CONSTITUTIONALLY PROTECTED FORM OF EXPRESSION.

As a preliminary matter, the parties, and the court below, agree that the distribution of free religious literature is a form of expression protected by the First Amendment. *International Society for Krishna Consciousness v. Lee*, 925 F.2d 576, 579 (2d Cir. 1991) ("[t]he Port Authority does not dispute that . . . distribution of religious literature [is] protected speech with the meaning of the First Amendment") (citations omitted).

This Court's consistent jurisprudence, for fifty years, recognizes the free distribution of literature as a form of expression protected by the United States Constitution. *See, e.g., Lovell v. City of Griffin*, 303 U.S. 446 (1938) and *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).[3] In-

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[3] The fact that Petitioners' solicit donations while distributing literature does not alter this conclusion. In *Heffron*, 452 U.S. at 647, this Court noted that the First Amendment protections afforded to "the oral and written dissemination of . . . religious

deed, in *Lovell*, this Court put the case for constitutional protection of leaflets and pamphlets quite clearly:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to *the vital importance of protecting this essential liberty from every sort of infringement* need not be repeated.

Lovell, 303 U.S. at 452 (emphasis added) (citations omitted).[4]

Of course, the constitutional value of leaflets and broadsides is not lessened by the fact that they address matters of religion. The pamphlets at issue in *Lovell*, religious in nature, were "a pamphlet and magazine in the nature of religious tracts. . . ." 303

views and doctrines" is not "lost because the written materials sought to be distributed are sold rather than given away or because contributions or gifts are solicited in the course of propagating the faith." 452 U.S. at 647 (and cases cited therein).

[4] An excellent discussion of the effective use of pamphlets, tracts and broadsides, by Whigs, in fomenting the American Revolution, is found in Davidson, Propaganda and the American Revolution at 209-23 (UNC Press 1941). Tories seldom, if ever, made effective use of tracts, pamphlets and broadsides, to reason with their fellows or to calm secessionist fervor. *Id.* at 310-11, 332-33.

U.S. at 448. Just five years after *Lovell*, in *Murdock v. Pennsylvania*, 319 U.S. 105 (1942), this Court said:

> The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses. It has been a potent force in various religious movements down through the years. . . . It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.

Murdock, 319 U.S. at 108-09 (1943) (footnotes omitted).

Beyond cavil, Petitioners' literature distribution activities warranted the constitutional protections accorded them below. Indeed, so plain is the right, and so valuable the liberty, that this Court must act, if at all, only with the closest inspection, as it reviews this matter.

II. WHETHER THE PORT AUTHORITY'S AIRPORT TERMINALS ARE TRADITIONAL PUBLIC FORUMS OR NONPUBLIC FORUMS, THE PORT AUTHORITY'S BAN ON DISTRIBUTION OF FREE RELIGIOUS LITERATURE DOES NOT WITHSTAND CONSTITUTIONAL SCRUTINY.

A. THE PORT AUTHORITY'S PUBLIC AIRPORT TERMINALS, ESSENTIAL PUBLIC THOROUGHFARES IN THE LIVES OF THE COMMUNITIES THEY SERVE, ARE TRADITIONAL PUBLIC FORA.

The district court below correctly decided that the Port Authority's Airport Terminals are traditional public forums. As long ago as the case of *Hague v. CIO*, 307 U.S. 496 (1939), this Court recognized that

> [w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515 (plurality opinion).

Streets, sidewalks, and parks represent the "quintessential public forums." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983). On the range of properties open in varying degrees to expressive activities, streets and parks lie at the very "end of the spectrum," *id.*; hence, "[o]ne who is rightfully on a street open to the public 'carries with him there as elsewhere the constitutional right to express his views in an orderly fashion.' " *Members of City Council of Los Angeles v.*

Taxpayers for Vincent, 466 U.S. 789, 810 (1984) (citations omitted). Thus, " 'public places' historically associated with the free exercise of expressive activities,such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.' " *United States v. Grace*, 461 U.S. 171, 177 (1983) (and cases cited).

The district court, *International Society for Krishna Consciousness v. Lee*, 721 F. Supp. 572 (S.D.N.Y. 1989), and the second circuit, *International Society for Krishna Consciousness v. Lee*, 925 F.2d 576 (2d Cir. 1991), disagreed on the appropriate classification for the Port Authority's Airport Terminals (ultimately, however, they agreed that the Port Authority's complete prohibition on leafletting was untenable). The district court's conclusion that the Airport Terminals are traditional public forums cannot be manifestly unreasonable—the second circuit noted that, until this Court's decision in *Kokinda*, it was "prepared to follow" the rule established in other circuits on the public forum status of airport terminals. 925 F.2d at 580 (citing *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981); *Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987); and, *Jews for Jesus, Inc., v. Board of Airport Commissioners*, 785 F.2d 791 (9th Cir. 1986)).

A reasonable determination of the public forum status of the Port Authority's Airport Terminals cannot be made without examining the facts revealed by the record. *Kokinda*, 497 U.S. at ___, 111 L.Ed.2d at 583 ("the location and purpose of a publicly-owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum"). In the present case, the district court found the public areas of the

Port Authority Airport Terminals to "possess the characteristics of a bustling metropolitan boulevard." 721 F. Supp. at 576. Based on the facts in the record, the district court concluded that the public terminals were "the functional equivalent of public streets." 721 F. Supp. at 577.[5]

The facts in this case fully support the district court's conclusion. As the *Kokinda* plurality suggested, the role of the disputed situs in "the daily commerce and life of the neighborhood or city" is an essential factor in the public forum determination. *Kokinda*, 497 U.S. at ___ , 111 L.Ed.2d at 570. Here, no rational person could justifiably assert that these Port Authority Airport Terminals are places insignificant in "the daily commerce and life" of the region served by the Port Authority Airports. Indeed,

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[5] The district court had before it the findings of a magistrate who had, on the facts and law, concluded that the Petitioners were entitled to summary judgment on their complaint. Appendix to the Petition for Certiorari at 72 (hereinafter cited as "App."). The magistrate's findings of fact amplify the correctness of the district court's conclusion that the Port Authority Airport Terminals were traditional public forums:

> [the] interior terminal areas bear a strong physical resemblance to the quintessential public fora of streets and parks. Like streets, they have broad corridors lined by shops, restaurants, newsstands, and other businesses, with travelers or other members of the general public coming and going as they please. . . . Like parks, they have large open areas where people meet each other or relax in public seats. They are open at all times of day, and there is absolutely no restriction on entry. In short, these areas both look and function like public thoroughfares.

App. 70-71 (citations and internal quotation marks omitted).

Respondent urged that its Cross-Petition be granted, at least in part, because airports "play a vital role in providing transportation to the nation." Cross-Petition for A Writ of Certiorari at 18.

Nor is the district court's conclusion inconsistent with this Court's prior holdings. When reviewing an asserted right of access for purposes of free expression, the crucial question is typically whether the forum at issue is sufficiently analogous to municipal sidewalks and streets so as to constitute a public forum. *E.g., Grace*, 461 U.S. 171 (sidewalk on perimeter of Supreme Court grounds indistinguishable from other city sidewalks); *Marsh v. Alabama*, 326 U.S. 501 (1946) (sidewalks and streets of company town indistinguishable from municipal sidewalks and streets); *Flower v. United States*, 407 U.S. 197 (1972) (per curiam) (street and adjoining sidewalks through military facility indistinguishable from municipal thoroughfare); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (shopping mall not functional equivalent of municipality); *Heffron*, 452 U.S. 640 (state fairgrounds significantly different from municipal streets).

Nor does the fact that the terminals are controlled and operated by the Port Authority dispose of the otherwise correct conclusion that the terminals are traditional public forum property. Technical ownership of the terminals, is irrelevant: "[*w*]*herever* the title of streets and parks may rest," *Hague*, 307 U.S. at 515 (emphasis added), these properties are "freely accessible and open to the people in the area and those passing through," *Marsh*, 326 U.S. at 507. It is this openness "for indiscriminate use by the general public," *Perry*, 460 U.S. at 47, this "traditional right

of access," *Taxpayers for Vincent*, 466 U.S. at 814, that characterizes public forum property.

Nor is it dispositive that the Port Authority's Airport Terminals lack a two hundred year history of use as traditional public forums. It is simply not in keeping with this Court's precedents to argue that a particular public property must have a history of specific expressive activities before it can be considered a public forum. In *Marsh* and *Flower*, there was no indication that other individuals had previously distributed literature on the sidewalks in question. In *Grace* and *Hague*, the Court saw no need to inquire whether previous demonstrations of any sort had taken place at the sites in question. Indeed, in *Hague*, there was "no competent proof that the parks of Jersey City are dedicated to any general purpose other than the recreation of the public," 307 U.S. at 505; this Court nevertheless ruled that streets and parks have, "time out of mind," been used for purposes of free expression, *id.* at 515.

Such a site specific inquiry, demanding proof of an established history of prior use, proves too much. Under such an approach, any newly incorporated municipality could avoid the strictures of the Constitution merely by constructing its public thoroughfares and parks in places where none had existed previously. Thus a ban on leafletting on that property, while certainly offensive to *the* Constitution would not offend *notions of history*. Such artifice cannot stand in for constitutional principle.

From the foregoing, it is plain that the facts of this case are in clear contrast to those of this Court's nonpublic forum cases, particularly *Perry*, *United States Postal Service v. Council of Greenburgh Civic*

Ass'ns, 453 U.S. 114 (1981), *Greer v. Spock*, 424 U.S. 828 (1976), *Adderley v. Florida*, 385 U.S. 39 (1966), and *Kokinda*.

The *Perry* case involved an interschool mail system, 460 U.S. at 38-39, and *Council of Greenburgh Civic Ass'ns* involved residential mailboxes, both nonpublic fora strikingly different from public sidewalks and streets.

In *Greer*, the disputed forum was the United States Army post at Fort Dix, New Jersey. 424 U.S. 828. The "special constitutional function of the military in our national life," 424 U.S. at 837, taken together with "the historically unquestioned power of [the base] commanding officer summarily to exclude civilians from the area of his command[,]" 424 U.S. at 838 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 893 (1961)), and the fact that the military command at Fort Dix had never "abandoned any claim of special interest" in controlling the conduct of visitors to the base, 424 U.S. at 837, led ineluctably to the Court's conclusion that Fort Dix was not a public forum. *Greer* itself acknowledged "the long-established constitutional rule that there cannot be a blanket exclusion of First Amendment activity from a municipality's open streets, sidewalks, and parks. . . ." *Greer*, 424 U.S. at 835.

In *Adderley*, this Court found no constitutional warrant to overturn convictions for trespass resulting from a demonstration held on nonpublic grounds of a Florida county jail. In *Adderley*, "the demonstrators entered the jail grounds through a driveway used only for jail purposes and without warning to or permission from the sheriff." 385 U.S. at 41. The jailhouse driveway was "not normally used by the public, but by

the sheriff's department for transporting prisoners to and from the courts . . . and by commercial concerns for servicing the jail." 385 U.S. at 45.

In this case, the district court found that the airport terminals "possess the characteristics of a bustling metropolitan boulevard." 721 F. Supp. at 576. In *Adderley*, the forum was nonpublic because it was reserved for internal governmental operations; here, the fora are traditionally public and the record is devoid of objective indicia suggesting that the sidewalks are reserved solely for internal governmental operations.

Finally, the analogy to the *Kokinda* case actually *undercuts* the Port Authority's arguments. In *Kokinda*, this Court addressed the forum status of certain postal service property:

> the Bowie post office is a free-standing building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use th[at] sidewalk to enter the post office. Th[at] sidewalk belongs to the post office and is used for no other purpose.

111 L.Ed.2d at 579 (citation omitted). The sidewalk along Route 197 was the "municipal sidewalk," which could be and was used for pedestrian access up and down Route 197. The other sidewalk, the post office

walkway, was constructed wholly within and on the post office property. That post office sidewalk was constructed for one purpose only, to provide a means of ingress and egress for postal patrons. 111 L.Ed.2d at 579, 582.

Unlike that postal sidewalk, the Port Authority Airport Terminals serve the myriad, nongovernmental purposes of their countless users. Beyond the private purposes of their airline passengers, the Terminals are shop-lined avenues open to the public and inviting the commercial interest of the public.

Thus, the district court correctly concluded that Port Authority Airport Terminals were traditional public fora. Having correctly determined the nature of the forum, the court turned to the issue of the ban on the distribution of religious materials. Here again, the district court concluded consistent with this Court's precedents that "the airports' character, pattern of activity and nature of purpose make the terminals appropriate places for the exercise of First Amendment activity and place them squarely within the public forum family." 721 F. Supp. at 579.

The district court's holding was plainly correct. The interests asserted by the Port Authority are no more powerful or carefully tailored to the regulation at issue than were the interests this Court found insufficient in *Grace*. Furthermore, the Port Authority's flat ban on leafletting also fails the compelling government interest standard.

The Port Authority's regulation prohibits all free distribution of written material. This flat ban applies throughout the airport terminals. When a governmental entity, including the Port Authority, under-

takes to prohibit an entire class of expression from a traditional public forum, its decision is subject to the most stringent examination. *Grace*, 461 U.S. at 177 ("[a]dditional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to achieve a compelling interest"); *see also Kokinda*, 110 S. Ct. at 3119 (plurality) ("[r]egulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny").

The Port Authority's ban on leafletting is just such an absolute prohibition on a type of expression. As such, it cannot be a "reasonable" time, place, or manner regulation. In a long line of cases, this Court has consistently struck down such sweeping prohibitions of cherished First Amendment speech. In *Board of Airport Commissioners*, 482 U.S. 569, for example, this Court held unconstitutional a regulation which prohibited all free speech activities in an airport terminal. As this Court explained, "we think it obvious that such a ban cannot be justified even if [the airport terminal] were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech." 482 U.S. at 575. Thus, this Court has already disposed of the possibility that a compelling interest exists to justify a flat prohibition on speech.

Nor has the Port Authority narrowly tailored its prohibition to achieve the goal of "safe, efficient and effective management" of the Airport Terminals. The complete prohibition of leafletting shows no sensitivity toward the rights of expression that it squelches. Rather than focusing on abusive practices, such as

obstructing passages or fraudulent solicitations, the Port Authority has banned the quiet leafletter with the noisome hawker of wares. Surely the Port Authority does not claim to be powerless to reach and proscribe disorderly conduct, unsafe movement or violence. The flat ban simply fails to distinguish between protected and unprotected activities. This minimal tailoring, a basic prerequisite for restrictions on free speech, is absent from the Port Authority's regulation.

Lacking a compelling interest, or even a significant interest, and having in addition failed to tailor its regulation to the asserted interests, the Port Authority has no basis for objection to the district court's decision below.

B. EVEN IN A NONPUBLIC FORUM, A TOTAL BAN ON LEAFLETTING IN AREAS OF PUBLIC AIRPORT TERMINALS OTHERWISE OPEN TO THE PUBLIC WOULD BE UNCONSTITUTIONAL.

Initially, the second circuit below was inclined to affirm the district court's conclusion that the airport terminals were traditional public forums. Between its initial consideration and the issuance of its opinion, however, this Court decided *Kokinda*. As understood by the second circuit court, *Kokinda* worked a substantial modification of this Court's Public Forum Doctrine, which modification compelled the conclusion that the airport terminals were nonpublic forums in which a flat ban on leafletting was unreasonable.

Even if these airport terminals were not traditional public fora, which was the conclusion of the second circuit below, the Port Authority's complete prohibition of leafletting is still unconstitutional under the standards applicable to nonpublic fora, as the second

circuit held. Viewed "in light of the purpose of the forum and all the surrounding circumstances," *Cornelius*, 473 U.S. at 808, a flat ban would be manifestly unreasonable here.

First, as the second circuit correctly concluded, this Court's decision in *Kokinda* turned on the distinction between in-person solicitation and leafletting. *International Society for Krishna Consciousness*, 925 F.2d at 582. The second circuit's analysis of *Kokinda* led it to conclude that a ban on the distribution of free literature would be unconstitutional. 925 F.2d at 582.

An apparent majority (the dissenting justices together with the concurring justice) considered the distribution of free literature to be a protected activity, even in a nonpublic forum. As the second circuit below stated:

> With regard to the ... ban on the distribution of literature, we read *Kokinda* as looking in a different direction. The four dissenting justices believed the sidewalk to be a public forum and additionally indicated that they perceived no relevant distinction between the in-person solicitation of funds and the distribution of leaflets. They would therefore allow the latter in the [property] in question. So too, we believe, would Justice Kennedy, whose concurring opinion stressed the need "to protect public places where traditional modes of speech and forms of expression can take place." Justice Kennedy relied entirely upon the distinction between the disruptive effect of the in-person solicitation of

> funds and the lesser inconvenience of the distribution of literature in upholding the ... regulation and did not reach the public/nonpublic forum issue. We thus count him as having adopted a view that would permit the distribution of literature in the instant matter. We also note that the four justices who considered the post office sidewalk to be a nonpublic forum also relied in part on the distinction between in-person solicitation and leafletting in upholding the regulation. There was thus a majority, and perhaps more, that would allow the latter.

925 F.2d at 582 (citations omitted).[6]

Second, there was no evidence to support the Port Authority's hypothesis that permitting leafletting might jeopardize or disrupt the safe, efficient and effective management of these airports. Rather, the Port Authority relied upon speculation, an undifferentiated fear, to support its conclusion that noncommercial leafletting would disrupt the transportation purposes of the terminals. The Port Authority failed

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[6] In this respect, *Kokinda* and the second circuit decision below are consistent with this Court's reasoning in *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). In *Grayned*, this Court focused on the "nature of a place, 'the pattern of its normal activities' " in seeking to define a reasonable regulation of time, place and manner. 408 U.S. at 116 (footnote omitted). As this Court indicated, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* The Port Authority leapfrogged past this key point of analysis and drew, without considered proof, the regulatory conclusion that all leafletting is completely incompatible with normal airport terminal activity at all places and at all times.

to prove that permitting the free distribution of literature would destroy the Airport Terminals. On this point, of course, both the district court and the second circuit were in agreement.

Third, given the purpose and circumstances of the airport terminals, an absolute prohibition of all leafletting would be patently unreasonable. These airport terminals bear all the indicia of city sidewalks, including heavy pedestrian use and attendant noise as well as adjacent commercial enterprise. App. 70-71; 721 F. Supp. at 576. Nor was the bare act of handing someone a piece of literature, inside the Port Authority Airport Terminals, shown to be somehow destructive of the Terminals.

There is no ready nexus between the "evils" of leafletting assertedly feared by the Port Authority and the flat ban; hence, the ban on all distribution of written material is unreasonable. A reasonable regulation is one which targets no more than the evil to be avoided. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

The Port Authority can cite no authority to support its implicit view that leafletting is a cognizable evil. Thus, even if the Port Authority's Airport Terminals were nonpublic fora, the complete prohibition of leafletting would remain manifestly unreasonable and unconstitutional.

CONCLUSION

For all the foregoing reasons, the Court should affirm the judgment of the United States Court of Appeals for the Second Circuit, to the extent that it

permits the free distribution of religious literature in the public concourses of the Port Authority Airports.

Respectfully submitted,

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